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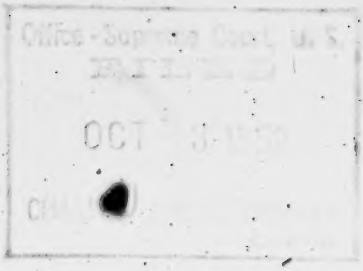

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 34

DAVID BROCK,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA,

Respondent

BRIEF OF DAVID BROCK, PETITIONER

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Question Presented

Was the petitioner placed twice in jeopardy for the same offense, on a charge of felonious secret assault, and, under the circumstances shown in this case, thereby, upon conviction and sentence of imprisonment, deprived of his rights under the Fourteenth Amendment to the United States Constitution, including the right not to be deprived of his liberty without due process?

Preliminary Statement

On March 31, 1952, this Court granted petitioner David Brock's motion for leave to proceed in *forma pauperis* and also his petition for writ of certiorari to have this Court

review a decision of the Supreme Court of North Carolina affirming the judgment of the Superior Court of Edgecombe County, North Carolina, ordering the petitioner imprisoned for a term of two years. That opinion is reported as *State* v. *David Brock*, 234 N. C. 390, 67 S. E. 282.

In its brief in opposition to the granting of the writ of certiorari the State of North Carolina raised procedural objections to the granting of the writ. In view of the action of this Court the petitioner will not devote argument to those objections, but will confine his argument to the merits.

Statement of the Matter Involved

This case presents a serious question relating to the petitioner's constitutional right under the fourteenth amendment of the Federal Constitution not to be placed twice in jeopardy for the same offense under the circumstances herein shown. (1) This case involves two trials, one in 1949 (the basis of a plea of former jeopardy), and one in 1951, from which this appeal comes.

All references below are to the record of the case certified by the Supreme Court of North Carolina. Every fact stated herein was admitted or agreed to by the State of North Carolina:

October 17, 1949, the Edgecombe County Grand Jury indicted defendant on a charge of felonious secret assault (R. pp. 2-3).

Defendant was then placed on trial on said valid indictment, before a court of competent jurisdiction, was properly arraigned, entered a plea of "Not Guilty," a competent jury was properly impaneled and properly sworn to make a true deliverance in the case (R. pp. 4 and 5). The State then offered its evidence and its witnesses against the defendant, offering the testimony of the following State's

witnesses: Alton Hathaway, J. H. Everett, Elmer Matthews, Sheriff Tom Bardin, Jim Cook, and

Alton Hathaway's testimony was to the effect that on the night of September 16, 1949, five shots were fired into a house occupied by Hathaway, his wife, his daughter, J. D. Wyatt and Mrs. J. D. Wyatt; that the shots were from a .22-caliber rifle fired from a passing automobile, and that the shots came close to the occupants of the house (R. pp. 6 and 7).

Sheriff Bardin's testimony was in part cumulative to that of Alton Hathaway, and added that Jim Cook confessed to Bardin that he, with the defendant Brock, with another, rode by Wyatt's house and did the shooting, with the defendant Brock actually handling the gun (R. pp. 7 and 8).

J. H. Everett's testimony was cumulative to part of that of Hathaway and Bardin (R. pp. 12 and 13).

Jim Cook's testimony was brief. He exercised his personal privilege to refuse to testify concerning the alleged shooting on the ground that to do so would incriminate him (R. pp. 13 and 14).

The same is true as to Elmer Matthews (R. pp. 14, 15 and 16).

At the conclusion of all the State's evidence the Solicitor for the State moved that a juror be withdrawn and a mistrial ordered and that the case be continued until a later date (R. p. 4, par. 5, and R. p. 16).

The Solicitor for the State moved upon the theory that the State would at a later date be able to present a stronger case against the defendant David Brock in that State's witnesses Cook and Matthews might at a later date testify differently or to additional facts than at the first trial (R. p. 4, par. 6, and p. 16).

Defendant objected to and resisted the motion (R. p. 4, par. 7, and pp. 16 and 17).

The Court, without cause or proper cause (R. p. 5, par. 8), made the following findings of fact, conclusions and ruling:

(1) The Solicitor for the State tried two cases growing out of the same transaction, *State* v. *Jim Cook*, and *State* v. *Elmer Matthews* (R. p. 16).

(2) The evidence in the said cases tended to show that the defendant David Brock fired rifle bullets into the home of J. D. Wyatt and that the defendants Jim Cook and Elmer Matthews were present, aiding and abetting him in committing said offense (R. p. 16).

(3) That the defendants Jim Cook and Elmer Matthews were convicted at this term of Court on the charge of assault with a deadly weapon, and after their conviction the Solicitor called for trial the case of State v. David Brock (R. p. 16).

(4) That during the course of the trial in the Brock case the Solicitor for the State undertook to use the defendants Jim Cook and Elmer Matthews as witnesses for the State (R. p. 16.)

(5) Counsel for Cook and Matthews advised them to rely upon their constitutional rights not to give testimony which would incriminate them for that no judgment had been entered in their case and that it was their intention to appeal to the Supreme Court if an adverse judgment was entered (R. p. 16). (Note: In respect to this finding of fact, defendant Brock points out that the record clearly shows (pp. 13, 14 and 15) that it was the State's Witnesses Cook and Matthews themselves, and Not defendant Brock, nor anyone acting on his behalf or representing him, who invoked their Personal right against self-incrimination. It is also a fact that prior to the Solicitor's calling the Brock case for trial, and prior to Brock's arraignment, Cook and Matthews stated to the Solicitor that they would refuse to testify as to the alleged felonious secret assault on the grounds that it would incriminate them, and that the Solicitor elected to put defendant Brock on trial and in jeopardy of conviction and punishment for felonious secret

assault with full and complete knowledge and notice of the foregoing.)

(6) The Court ruled that State's witnesses Cook and Matthews would not be required to testify as to facts that would tend to incriminate them for the reason that their cases had not been finally disposed of in the Supreme Court (R. p. 16).

(7) The Court is of the opinion that the ends of justice require that the State have available for it the testimony of Cook and Matthews when the case is tried and that the State is entitled to have those witnesses to testify after their cases have been disposed of in the Supreme Court (R. p. 16).

The Court then stated that it "in its discretion withdraws a juror, Roland Fountain, and orders a mistrial of this case and that the same be continued" (R. p. 17).

Defendant Brock objected to the foregoing findings of fact, conclusions of law and ruling of the Court, and reserved an appropriate exception (R. p. 17), and subsequently availed himself of all rights thereunder upon his second trial in his plea of former jeopardy (R. pp. 13 and 18), in which he raised and relied upon his rights under the Fourteenth Amendment.

About 17 months later, on March 7, 1951, during the regular March 1951 Term of Superior Court of Edgecombe County, the case of *State* v. *David Brock*, on the same indictment for felonious secret assault, was again called for trial (R. pp. 3 and 18).

At the time of his arraignment, and before any other plea, defendant Brock entered his written and sworn plea of former jeopardy, which appears of record (pp. 3 and 18), and which sets forth the facts hereinbefore mentioned, among other things. Reference is made to the plea itself, and the Exhibit A attached thereto and incorporated therein, for the full plea. Every factual allegation thereof is and was admitted by the State of North Carolina.

The Solicitor for the State then announced that he denied that the facts set forth in the plea of former jeopardy were legally sufficient to sustain a plea of former jeopardy (R. p. 18). The Solicitor did not controvert the facts set forth in said plea (R. p. 18), but, for the purposes of this case, admitted them (R. p. 18).

The Court ruled that the facts set forth in the plea, taken as true, are insufficient to sustain a plea of former jeopardy, and overruled and denied defendant's plea (R. p. 18). By its ruling the trial court overruled petitioner's plea in so far as it was based upon the Fourteenth Amendment.

To the foregoing ruling, defendant entered appropriate objection and reserved appropriate exception (R. p. 18). This was carried forward as defendant's exception No. 1, under assignment of error No. 1 in his appeal to the Supreme Court of North Carolina.

Defendant then moved the Court to permit his plea of former jeopardy to go to a jury, and the facts to be passed upon by a jury (R. p. 18).

The Court denied the motion and defendant entered and reserved appropriate objection and exception (R. p. 18). This is carried forward as defendant's exception No. 2, under assignment of error No. 1 in his appeal to the Supreme Court of North Carolina.

Defendant then, reserving his rights under his plea of former jeopardy, and his exception theretofore set out, pleaded "Not Guilty" (R. p. 19).

At this point, the Solicitor for the State announced in open court that the State would ask for a verdict of guilty of assault with a deadly weapon under the indictment for felonious secret assault (R. p. 19).

A jury was then summoned, selected, impaneled and sworn to try the cause (R. p. 19).

The State presented in evidence testimony substantially the same as that presented in the first trial, with the addition of the testimony of Jim Cook who had previously exercised his right against self incrimination not to testify at the earlier trial. At the time of the second trial Jim Cook was a State prisoner. His testimony, in substance, corroborated the testimony which other State's witnesses had presented in the first trial and which they repeated in the second trial.

The jury returned a verdict as to the defendant of "guilty of assault with a deadly weapon".

Thereafter, the Court entered judgment that defendant Brock should be confined to jail for a period of two years, and assigned to work upon the roads (R. p. 35). Defendant entered and reserved appropriate objection and exception (#54), and appealed. This exception is brought forward under assignment of error No. 8 in his appeal to the Supreme Court of North Carolina.

At the trial in the Superior Court, in his plea of former jeopardy, and on appeal in the Supreme Court of North Carolina the petitioner relied upon and properly preserved his contention that his rights under the Fourteenth Amendment to the Federal Constitution had been violated by twice placing him in jeopardy for the same offense under the circumstances of this case.

Jurisdiction

This Court has jurisdiction under Section 237 (b) of the Judicial Code (U. S. Code, Title 28, Sec. 344 (b)), 28 U.S.C. Section 1257 (3).

The Supreme Court of North Carolina filed its opinion and entered final judgment October 31, 1951.

ARGUMENT

The petitioner was twice placed in jeopardy for the same offense, on a charge of felonious secret assault, under such circumstances that his resulting conviction and sentence of imprisonment constitute a deprivation of his right under the Fourteenth Amendment to the United States Constitution not to be deprived of his liberty without due process of law.

In this case it clearly appears, and is agreed by all that petitioner was in 1949 deliberately placed on trial on a felony charge by the State, which had full knowledge of the witnesses and testimony available to it, and was submitted to all the dangers and jeopardy of conviction in a proceeding wherein the State presented against him a case legally sufficient to convict, and that at the conclusion of the State's evidence the State, over petitioner's objection, obtained a mistrial on the sole theory that later the State might present a stronger case because some of its witnesses might later agree to testify to different or additional facts. About seventeen months later, in 1951, the State again placed the petitioner on trial, and did obtain additional testimony against the petitioner from one of its witnesses who had, since the first trial, become a state prisoner as well as a state witness.

Petitioner submits that the procedure utilized to deprive him of his liberty was so arbitrary and so unfair as to violate any reasonable conception of due process.

Whether or not placing a defendant twice in jeopardy for the same offense should be held, *per se*, a denial of due process (see *Corpus Juris Secundum*, Volume 16, in the treatise on "Constitutional Law", Section 582, at page 1117, where it is stated that "Double jeopardy for the same offense is a denial of due process. . . .", citing *Ex parte*

Ulrich, D. C. Mo., 42 F. 587, reversed on other grounds, C.C. 43 F. 661, appeal dismissed 13 S. Ct. 1053, 149 U. S. 789, 37 L. Ed. 937.

See also Section 579, at pages 1171 and 1172, of the same treatise which, citing cases, points out:

> "Due process of law in a criminal case requires a law creating and defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial before an impartial judge or judge and jury, according to established criminal procedure, *and a right to be discharged unless found guilty.*" (Italics added.)

it is perfectly clear from the decisions of this Court on the point that this Court will examine all the circumstances of each case separately to determine whether, in their light, the State's action did "satisfy the necessity for basic fairness which is formulated in that (the Fourteenth) Amendment," quoting Mr. Justice Reed in *Gibbs* v. *Burke*, 337 U. S. 773, 782, 93 L. Ed. 1686.

Hence, under the doctrine of *Palko* v. *Connecticut*, 302 U. S. 319, 329, 82 L. ed. 288, the petitioner submits that he was denied that "basic fairness" required by the Fourteenth Amendment. In the *Palko Case* the question was whether a statute permitting the State to appeal in criminal cases and obtain a new trial because of errors in the first trial, thereby, subjecting a defendant to a second trial was a violation of the Due Process Clause. In an opinion by Mr. Justice Cardozo this Court held the statute did not violate the requirement for basic fairness because:

> "The State is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him (the defendant) shall go on until there shall be a trial free from the corrosion of substantial legal error. . . .

> This is not cruelty at all, nor even vexation in any immoderate degree."

In the instant case there is no claim or hint that there was error prejudicial to the state. Neither was there any emergency or unexpected or surprise development prejudicial to the State. Therefore, the other points made by Mr. Justice Cardozo in the *Palko Case* are most important:

> "What the answer would have to be if the State were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider."

The distinction Mr. Justice Cardozo makes from the facts in the *Palko Case* as a probable basis for a different result is exactly the distinction between the facts in this petitioner's case and the facts in the *Palko Case*.

Therefore the petitioner invokes the doctrine enunciated by Mr. Justice Cardozo that this Court will examine the circumstances of this case to determine "On which side of the line the case made out by the appellant has appropriate location. . . . Is it that kind of double jeopardy . . . which . . . has subjected him to hardship so acute and shocking that our polity will not endure it?"

The petitioner submits that Mr. Justice Cardozo then deliberately described a case on all fours with this petitioner's case as an indication of what would be the kind of double jeopardy which violates the requirements of the Due Process Clause.

In a more recent double jeopardy case, *Louisiana* v. *Resweber*, 329 U. S. 459, 481, 91 L. ed. 422, Mr. Justice Reed indicates in an opinion joined in by Mr. Chief Justice Vinson, Mr. Justice Black and Mr. Justice Jackson, that the *Palko Case* does not foreclose the possibility that the Fourteenth Amendment does prohibit a State from depriving a de-

fendant of his liberty under circumstances which would constitute a violation of the Fifth Amendment. The petitioner does not think an affirmative answer to that question to be necessary to his case, but submits that the answer, as a practical matter, should be in the affirmative because the type of double jeopardy which is held to violate the Fifth Amendment is in reality the type which is, in the words of Mr. Justice Frankfurter, in his concurring opinion, "offensive to a decent respect for the dignity of man, and heedless of his freedom". The following is from Mr. Justice Reed's opinion, wherein it was held that Louisiana's second attempt to execute Willie Francis, after a mechanical failure of the electric chair frustrated the first, was not a deprivation of due process:

> "To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Fifth . . . Amendment(s), as to double jeopardy . . . would be violative of the due process clause of the Fourteenth Amendment. (Citing in footnote No. 2, *Lee Twining v. New Jersey*, 211 U. S. 78, 99, 53 L. Ed. 97, 106, 29 S. Ct. 14; *Palko v. Connecticut*, 302 U. S. 319, 324, 82 L. Ed. 288, 291, 58 S. Ct. 149; *Re Kemmler*, 136 U. S. 436, 445, 34 L. Ed. 519, 523, 10 S. Ct. 930; *Collins v. Johnston*, 237 U. S. 502, 510, 59 L. Ed. 1071, 1079, 35 S. Ct. 649.)

Then, referring to and on the authority of, the *Palko* case, *supra*, Mr. Justice Reed points out that the circumstances of the case do not render the second attempt to execute Willie Francis a violation of the Due Process Clause.

In a concurring opinion, Mr. Justice Frankfurter points out that the rights of a defendant under the Fourteenth Amendment are not necessarily limited to the rights conferred as against the Federal Government in the Fifth

Amendment, but may, indeed, be more extensive if "civilized standards" so demand. Of course, no one would deny that if the Fifth Amendment, or any other, actually embodies a basic right required by "civilized standards", it is of necessity also embodied in the Due Process Clause of the Fourteenth Amendment. The only point of disagreement could be whether a particular right is "basic" in that sense, or, as the petitioner submits, without conceding that it is necessary to his case, that in fact the rights guaranteed by our founding fathers in the original Bill of Rights (particularly the double jeopardy provision of the Fifth Amendment) are all, as they obviously believed, necessary protections against tyranny and therefore "basic" in the same sense. In the end, the possible disagreement may well boil down to a difference in judgment upon specific and varying sets of circumstances in what Mr. Justice Frankfurter terms

> "the gradual and empiric process of 'inclusion and exclusion'" (citing *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616, 619), in his opinion, joined in by the majority of this Court in *Wolf v. Colorado*, 338 U. S. 25, 48, 93 L. Ed. 1782.)

The petitioner submits that in the *Palko* case, *supra*, Mr. Justice Cardozo has correctly indicated that the cause the petitioner brings before this Court falls on the side of the line which is violative of the Due Process Clause. In days closer to personal experience of our own people with the ways of tyranny, the Supreme Court of North Carolina pointed out in apt language why that is so. In *State* v. *Garrigues*, 2 N. C. 241 (1765) that Court wrote:

> ". . . in the reigns of the latter Stuart family, a different rule prevailed, that a jury in such cases might be discharged for the purpose of having better evi-

dence against him at a future day; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the Courts of this country. In the time of James II, and since the Revolution, this doctrine came under examination, and the rule laid down by Lord Coke revived.

". . . In the present case the jury were suffered . . . to separate without giving a verdict . . . and perhaps (the defendant) could not be tried again with the same advantage to himself as then. Perhaps his witnesses are dead, or gone away, or their attendance not to be procured, or some accident may prevent their attendance. We will not again put his life in jeopardy, more especially as it is very improbable we shall be able to possess him of the same advantages.

"So he was discharged."

The foregoing opinion was written many years ago, and in a time in our history when the men who would become the founding fathers were deeply concerned about the rights of individual citizens as against the crown or state, and the danger of tyranny where the individual's rights and liberties were not vigorously upheld by a conscientious judiciary.

The principle therein stated—that for the crown (or state) to work the discharge of a jury for the purpose of having better evidence against a defendant at a latter day "is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the Courts of this country" . . . is equally true today. The petitioner submits that it is the very principle Mr. Justice Cardozo meant to preserve when he distinguished the facts in the *Palko* case, *supra*. Mr. Justice

Reed points out in *Louisiana* v. *Resweber*, 329 U. S. 459, 481, 91 L. Ed. 452, that, "as this is a prosecution under state law, as far as double jeopardy is concerned, the *Palko* case is decisive."

The admonition of Mr. Justice Frankfurter in his dissenting opinion in *On Lee, Petitioner* v. *the United States of America*, No. 543, October Term, 1951, (a case where the use of evidence obtained in violation of the Fourth Amendment was the basis for a claim of denial of due process) is apt in this case:

> "The law of this Court ought not to be open to the just charge of having been dictated by the "odious doctrine", as Mr. Justice Brandeis called it, that the end justified reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality. It derives from a preoccupation with what is episodic and a disregard for long-run consequences. The method by which the state chiefly exerts an influence upon the conduct of its citizens, as was wisely said by Archbishop William Temple, is "The moral qualities which it exhibits in its own conduct."

North Carolina, itself, early recognized in "double jeopardy" cases the truth of what Mr. Justice Frankfurter has said. In the case of *In re Speir*, 12 N. C. 491 (1827) that Court pointed out:

> HALL, J.: "In this case the guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be when it is brought before this Court on a collateral question of law. Although, the prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be bulwark of safety to those who, more innocent, may become the subjects of persecution, and whose con-

viction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not."

TAYLOR, C. J.: "In the remarkable case of Kenlocks, Foster, 76, . . . a majority of the judges . . . rejected with just animadversion the authority of those cases which had occurred in that period of misrule and persecution preceding the revolution. In one of these the court discharged the jury in a capital case, after evidence given on the part of the Crown, merely for want of sufficient evidence to convict, and in order to bring the prisoner to a second trial, when the Crown should be better prepared . . . .

"These stains upon the administration of justice show to what extremes, in a state of civil discord, the passions of men urge them to trample upon the most salutary principles of law, and in what degree judges holding their office at the will of the sovereign, were eager to pander to his appetite for blood and forfeitures . . .

"As the common law of the State already protects the accused against a second trial, not only in crimes of all descriptions, but in questions of civil right, it is to be inferred that the Constitutions (State and Federal) meant much more, and that their design was to protect the accused against a trial where the first jury had been discharged without due cause."

This petitioner requests that this Court "apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken." See opinion by Mr. Justice Frankfurter in *Watts* v. *Indiana*, 338 U. S. 49, 62, 93 L. Ed. 1801, wherein it was held that use of a confession wrung from a defendant violated the Due Process Clause.

Conclusion

For the reasons set forth above the judgment below against this defendant should be reversed.

Respectfully submitted,

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